No. 80-1212

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In the Supreme Court of the United States

October Term, 1980

FRANK WATTS,
Petitioner,

vs.

CIVIL SERVICE BOARD FOR THE CITY OF COLUMBIA, TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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STATEMENT OF QUESTIONS PRESENTED

1. Did the Supreme Court of the State of Tennessee err in affirming the decision of the Civil Service Board of the City of Columbia, Tennessee, when the Civil Service Board approved the discharge of Officer Frank Watts for his failure to follow the written directives of the Chief of Police of the City of Columbia?

2. Did the Supreme Court of the State of Tennessee err in affirming the decision of the Civil Service Board of the City of Columbia, Tennessee, that discharged Officer Frank Watts of the City of Columbia Police Department for using insulting language in a heated discussion with the District Attorney General?

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No. 80-1212

In the Supreme Court of the United States

October Term, 1980

FRANK WATTS,
Petitioner,

vs.

CIVIL SERVICE BOARD FOR THE CITY OF COLUMBIA, TENNESSEE,
Respondent.

BRIEF OF RESPONDENT, THE CIVIL SERVICE BOARD OF THE CITY OF COLUMBIA, TENNESSEE IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Your Respondent, the Civil Service Board of the City of Columbia, Tennessee, respectfully requests that the Court deny the Petition for Writ of Certiorari filed by Petitioner Frank Watts seeking a review of the opinion of the Supreme Court of the State of Tennessee, at Nashville Tennessee, dated September 8, 1980. Petition to Rehear denied by an opinion dated October 20, 1980.

STATEMENT OF CASE

This case grows out of the termination of the Petitioner, Frank Watts, as a policeman for the City of Columbia, Tennessee. On its face, the petition seeks to raise constitutional questions which have been thoroughly explored and rejected by both the Circuit Court for Maury

County, Tennessee, the Court of Appeals, Middle Section at Nashville, Tennessee (See Op. of Ct. App. included in this volume as Appendix "A", p. 15), and the further opinion of the Supreme Court of the State of Tennessee, set forth in full in Appendix "A", pp. 1-20, of the Petition for Certiorari.

The Petitioner, Frank Watts, was until April 25, 1977, a member of the Columbia Police Department. On that date he was suspended indefinitely by Mr. Barrett Jones, City Manager of the City of Columbia, Tennessee. The charges as set out in the City Manager's letter of April 25, 1977, for which charges the Petitioner was suspended, were:

"(1) Your disobeying a written directive of the Chief of Police, and

"(2) Your conduct unbecoming an officer on or about February 3, 1977, both violations of the Standard Operating Procedure Manual of the Columbia Police Department." (Said letter is set forth in full in the Petition for Certiorari in Appendix "F", p. 29)

A hearing was held before the Civil Service Board of Columbia. The Board upheld the suspension of the Petitioner.

The Petitioner filed a common law writ of certiorari in the Circuit Court for Maury County, Tennessee, which was granted. The provisions of this appeal are governed by *Tennessee Code Annotated,* §27-914. The Circuit Court for Maury County, Tennessee, upheld the decision of the Civil Service Board of the City of Columbia in suspending the Petitioner. The Petitioner filed a motion for a new trial which was overruled, after which the Petitioner prayed an appeal, which was granted. The Petitioner's

appeal was defective in that the appeal bond was not properly executed. The Petitioner then filed a motion for writ of error, accompanied by a bond, certified transcript and the assignments of error and brief of law. The Court of Appeals for the Middle Section at Nashville, Tennessee, affirmed the judgment of the trial court after due consideration. (Op. reproduced herein in Appendix "A", p. 15) An appeal was then prayed to the Supreme Court for the State of Tennessee, which was granted. The Supreme Court for the State of Tennessee rendered an opinion dated September 8, 1980, wherein the actions of the lower courts and the Civil Service Board of the City of Columbia, Tennessee, were affirmed.

The factual situation upon which this case is based is as follows. The Petitioner, Frank Watts, went before the Maury County Grand Jury on June 4, 1976, in his capacity as a police officer for the City of Columbia, Tennessee. The City of Columbia, Tennessee, was totally unaware of Officer Watts' appearance before the Grand Jury until after his appearance had been made. The Grand Jury then returned an indictment against one Ernie Anglin for concealing stolen property. The case subsequently came on for trial on January 17, 1977, wherein it appeared there was a defect in the indictment. The Assistant Attorney General then moved that the case be nolled.

On February 21, 1977, the Petitioner, Frank Watts, received a letter from the Chief of Police of the City of Columbia. This letter was approved by Barrett Jones, the City Manager of the City of Columbia, Tennessee, that stated that Officer Watts was not to pursue the case against Ernie Anglin any further without first obtaining clearance from either the Chief of Police or the City Manager. (See Appendix "C", pp. 24-25, to petition for certiorari) Specifically, the Chief of Police and the City Manager of Co-

lumbia requested that any proceedings undertaken in the case be done through the proper official channels and by observing the Police Department regulations, policies and procedures.

Petitioner, Frank Watts, subsequently wrote a letter to the City Manager on March 9, 1977 (See Appendix "D", p. 26, to petition for certiorari), requesting permission to go before the Grand Jury. Since the Petitioner had failed to make any record of the case he was investigating, this permission was denied. He was advised if he desired to pursue this investigation to share his information and evidence with the Detective Division which handles investigative matters on criminal problems, and if, upon their investigation with his aid, the evidence supported a finding of probable cause to prosecute this case, the department would certainly grant permission to present the case to the Grand Jury. (See letter dated March 10, 1977, Appendix "E", pp. 27-28, to petition for certiorari)

The Petitioner, Frank Watts, then, without even consulting the Detective Division of the City of Columbia Police Department or setting up a case file on the investigation af Anglin, or in any manner seeking to coordinate his efforts with the City of Columbia Police Department appeared again before the Grand Jury. The Grand Jury did not indict Ernie Anglin after this appearance.

The Petitioner then approached Robert H. Gay, District Attorney General for the Eleventh Judicial Circuit of the State of Tennessee, at his office in Lawrenceburg, Tennessee. The Petitioner questioned the Attorney General concerning his office's failure to pursue any further indictments against Ernie Anglin. The Attorney General testified in summary that there was a problem with the statute of limitations in pursuing the case since the gun that was allegedly stolen was located pursuant to a search

warrant issued in 1972; that the statute of limitations for the crime was four years and that his office's previous investigation during 1973 and 1974 of this case, he felt was adequate.

The discussion between the Petitioner and the Attorney General then became a very "heated discussion". The Attorney General advised the Petitioner that if he was going to continue to raise his voice that he would ask him to leave because he didn't think it was proper for the Petitioner to address the Attorney General in the manner and voice that he was using. Attorney General Gay then further testified, as is found in the B.E. Ex. 16-A, p. 96:

> "He [Frank Watts] got up to leave and then as I stood up, I was going to escort him to the door as I do anyone who comes to my office, he pointed his finger and he said, 'Now there's going to be further investigation of this and perhaps your office.' And he used the words, and why I do not understand, 'that no two-bit politician is going to keep him from presenting a case to the grand jury.'" (Brackets added)

The Attorney General then reported this incident to the Chief of Police of the City of Columbia, on February 16, 1977.

Attorney General Gay at the hearing advised the Board that he investigated the case after his discussion with the Petitioner and found that the Petitioner had never reported his investigation of the case to the proper authorities with the Police Department of the City of Columbia, and that he had personally checked to see whether or not there was any offense report filed with the City of Columbia and that his investigation revealed that there was no file in this case whatsoever at the City

of Columbia Police Department. The Attorney General further checked to see whether the procedures that were normally followed by the City of Columbia Police Department had in fact been followed in this case and determined that they had not. That there was no offense report of the crime either filed with the City of Columbia or with the Maury County Sheriff's Department.

The Attorney General further stated that he checked with the Tennessee Bureau of Investigation and also with the Alcohol, Tobacco and Firearms Division of the Federal Government concerning this case and after checking all of these sources ascertained that this was a private investigation of a police officer carried on outside the scope of the normal operations of the City of Columbia Police Department. Attorney General Gay then testified, as is found in the B.E. Ex. 16-A, p. 102:

> "He threatened, he threatened in the first place, 'there is going to be further investigation.' He said, 'first, no two-bit politician is going to tell him what to do.' And then he said, 'there'll be a further investigation on this and you may be involved too.' This was as he went down my stairs. My office is on the second floor and I couldn't appreciate a threat. Our office is open. It's open to public scrutiny. As a matter of fact, we owe our stewardship in our office to the public, they elected us, and this is the procedure we follow."

Chief Edward Holton, the Chief of Police of the City of Columbia, read into the record Sections D.08 and G.13 of the Columbia Police Department Manual, as follows:

> "A 'All lawful orders of superior officers shall be cheerfully, faithfully and promptly obeyed and enforced without question or argument. If

any officer does not clearly understand an order, he shall ask for such information as may be necessary for a clear understanding but under no circumstances shall he question the authority of a superior officer or engage in any argument concerning the orders given.'

"Q And if you would, read please from page 15 of the Columbia Police Department Manual, Section G.13.

"A 'Members shall at all times be courteous and civil to the public and to one another. They shall be quiet, orderly, attentive and respectful and shall exercise patience and discretion in the performance of their duties. At no time shall they use coarse, profane or insultant (sic) language to any citizen or shall they speak disparingly of any nationality, race, creed, religion or political belief.'" (B.E. Ex. 16-B, pp. 134, 135)

Chief Holton further testified that "Everybody [in the Police Department] is given a copy of the manual and has a certain length of time to read it and familiarize themselves with it." Chief Holton testified that he felt sure that Mr. Watts was familiar with the manual. (B.E. Ex. 16-B, pp. 135, 136) (Brackets added)

Barrett Jones, City Manager of the City of Columbia, testified that he did send the letters of February 21, 1977 and March 10, 1977, to Officer Frank Watts. (B.E. Ex. 3 and 4) Mr. Jones further testified "that if he [Frank Watts] felt he needed to conduct an investigation of this matter he should do so within the Police Department." (B.E. Ex. 16-A, p. 18) (Brackets added) Barrett Jones further testified that there was no record at the Columbia Police Department that this matter was being investigated by a Columbia policeman. (B.E. Ex. 16-A, p. 19) Mr.

Jones was then contacted by Attorney General Gay, who stated "that Mr. Watts had come to his office and that Mr. Watts had wanted to prosecute this case and that Mr. Watts was very belligerent, shouting, obnoxious in his office regarding the prosecution of this case, and that he created some little scene in the office." (B.E. Ex. 16-A, p. 20)

The City Manager then testified as follows:

"Q Did you intend to just flatly deny Mr. Watts the right to ever appear before the Grand Jury regarding this case?

"A I think we made it very clear to Mr. Watts that all we were asking is that he follow procedures of the Department in pursuing this or any other case, that there should be a file established in the Department, it should go through the Department investigative division.

"Q Is there any way to your knowledge for the Columbia Police Department to determine what their officers are doing without following this procedure?

"A I wouldn't be aware of any way you could.

"Q Did Officer Watts subsequent to the time that you wrote this letter, did he ever at that time turn over any evidence or work in conjunction with the Department, the Detective Department as instructed in that letter?

"A No.'

The City Manager then testified as to reasons for the suspension of Officer Frank Watts:

"Well Mr. Watts had very willfully disobeyed a written order of his superior officer and it appeared to me

> that he was, just wanted to put the Chief and/or the City to a test as to who is to supervise the Department and that it was very clear-cut case of whether or not he was going to be subject to any direction by the Department or his employers and he defied the action of the Chief of Police. That was one reason. And then of course his conduct in the office of the Attorney General was another matter and I would certainly feel that any police officer and any city employee, especially any police officer, would have an obligation to conduct themselves in a business-like manner when talking with any members of the public and certainly with the Attorney General of this District and I felt those were both very serious matters and I felt that he deserved an indefinite suspension for this." (B.E. Ex. 16-A, pp. 31, 32)

All of the courts that have reviewed this decision of the Civil Service Board have agreed that the order that Officer Watts disobeyed was a lawful order requiring Officer Watts to cooperate with his superior officers and fellow employees in the conduct of the Anglin investigation. The courts have further held that Officer Watts by his own admission failed to cooperate with his superior officers. That the orders given to Officer Watts were not intended to interfere with the individual rights of Officer Watts to appear before the Maury County Grand Jury. The orders merely set forth the procedure that Officer Watts as a member of the Columbia Police Department was to follow in pursuing a criminal investigation.

The Court of Appeals, for the Middle Section at Nashville, Tennessee (Opinion at Appendix "A", p. 15), and the Supreme Court for the State of Tennessee held that there was substantial material evidence to support the

finding that the Petitioner was guilty of violating the police regulation against coarse, profane or insulting language. Secondly, that there was substantial evidence and proper legal constitutional grounds in finding the plaintiff guilty of misconduct meriting discipline. Thirdly, that the constitutional right of free speech allows reasonable expressions of opinion, but does not prevent a police department from limiting the manner of expression by its members.

ARGUMENT AND CITATION OF AUTHORITY

Your Respondent submits that the Petition for Writ of Certiorari should be denied, since it totally fails to raise any federal questions of substance but seeks review in a case where the main questions are questions of fact.

The Supreme Court for the State of Tennessee in its opinion held that this was not a case where the plaintiff was punished for publicly criticizing the actions of his superiors or policies of the police department, nor is this a case where overbroad or vague department rules are involved. The mandates here involved are reasonable. One is not required to guess what conduct is deemed or what utterances are prescribed. (Sup. Ct. Op. Appendix "A" to Petition for Certiorari, p. 15) Perhaps one of the leading cases concerning the First Amendment rights of public employees is the case of *Pickering v. The Board of Education*, 391 U.S. 563, 99 Sup. Ct. 1731, 20 L. Ed. 2d 811 (1968). In this case, a public school teacher was discharged because of a letter to the editor of a local newspaper that he wrote criticizing the Board of Education's Superintendent of Schools on the subject of revenues for the schools. In the *Pickering* case the Court found that the statements made by Pickering were in no way directed towards any person with whom Picker-

ing would normally be in contact in the course of his daily work as a teacher. The Court in *Pickering* found that no peculiar state interest arising from the employment relationship was at stake and that Pickering was, therefore, entitled to the same First Amendment protection afforded the general public. In the case of *Kannisto v. City and County of San Francisco,* 541 F. 2d 841 (1976), the Ninth Circuit, in a case very similar to the one at Bar, held that a regulation proscribing conduct of a member tending to subvert the good order, efficiency or discipline of the department or to inflict discredit upon the department or any member was not unconstitutionally applied in violation of the First Amendment rights of the police lieutenant. In this case, Lieutenant Kannisto had made disrespectful and disparaging remarks about a superior officer while addressing his subordinates during a morning inspection. He had described his superior as a most unreasonable, contrary, vindictive individual whose behavior was unreasonable, belligerent, arrogant, contrary and unpleasant. As in the case of the Attorney General, Robert H. Gay, the Court found that Kannisto's comments were directed against one under whose direction he worked in close daily contact. Therefore, the questions of discipline and harmony are clearly presented. His comments were presumed to have a substantial disruptive influence on the regular operations of the department. The Ninth Circuit stated in *Kannisto*:

> "Finally, it is clear to us that Kannisto exercised his asserted First Amendment rights, not as a member of the general public, as in Pickering, 391 U.S. 572, 99 Sup. Ct. 1731, but as an officer of the department. In this respect his rights are simply not the same as those asserted in Pickering. See Phillips, supra, 491 F. 2d 955.

> "For the reason expressed, we conclude that the department has not unconstitutionally applied its regulations to protected conduct."

The Supreme Court for the State of Tennessee decided on virtually the same basis as set forth in *Kannisto* that the statements of the Petitioner to the District Attorney General were sufficient to support the action of the Board in finding that the Petitioner was guilty of violating the mandate against using insolent or insulting language to any citizen, which amounted to conduct unbecoming an officer that would impair the performance of his duties.

The fact that in this case the District Attorney General complained to the Chief of Police of the City of Columbia is evidence that the Petitioner's work with that official would be impaired.

In both the *Kannisto* and *Pickering* cases, the courts held that it was important to determine whether or not the statements made by the employee would impede the proper performance of the employee in his daily duties. In this particular case the Supreme Court for the State of Tennessee found that it would.

In *McQuillin, Municipal Corporations*, Vol. 4, 3rd Rev. Ed., §12.240 (1979), p. 282 it gives a good summary of the law in regard to statements of public employees:

> "A municipal employee has an absolute obligation to perform satisfactorily the duties and work in his position. He may speak as he wishes but also must be responsible for his statements. When his speech is disruptive of the proper functioning of the public's business, the privilege of governmental employment may be withdrawn without it being said that he was denied freedom of speech. To hold otherwise would enable governmental employees to practice the rankest

> form of insubordination and safely hide behind the right of free speech. Gasparinetti v. Kerr, 568 F. 2d 311 (CA 3rd)."

In regard to the Grand Jury issue in this case, the Petitioner conceded that he failed to prepare a file on his investigation and to consult his superiors as directed by the Chief of Police. The Supreme Court for the State of Tennessee held, and we think correctly so,

> ". . . We do not think that the plaintiff's right to appear before a grand jury necessarily insulates him from discipline as a result of this failure." Sup. Ct. Op. Appendix "A", p. 18)

Respondent feels that it is important to point out the fact that Ernie Anglin, who was the object of this investigation, was not a member of the Columbia Police Department nor an official of the City of Columbia, Tennessee, in any respect. Although it has been alleged that he was a friend of the Mayor's, there is no proof in the record to support these allegations.

As was pointed out to each and every Court that has ruled upon the facts in this case, the Petitioner violated all of the orders issued to him by his superiors and has sought to avoid dismissal for the disobeyance of these orders simply because he appeared in front of the Grand Jury prior to his dismissal.

The reasons for the Petitioner's discharge were not his appearance in front of the Grand Jury, but his total failure to obey the orders given to him in writing by his superiors and his insulting remarks to the Attorney General during the heated discussion in the Attorney General's office.

CONCLUSION

For the reasons given above, your Respondent respectfully submits that the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX "A" - (OPINION OF THE COURT OF APPEALS, MIDDLE SECTION, NASHVILLE, TENNESSEE)

(Filed June 29, 1979)

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

MAURY LAW

FRANK WATTS
Plaintiff-Appellant

VS.

CIVIL SERVICE BOARD FOR
CITY OF COLUMBIA, TENN.
Defendant-Appellee

APPEAL FROM CIRCUIT COURT, MAURY COUNTY, TENNESSEE
THE HONORABLE JOE M. INGRAM, JUDGE

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HENRY F. TODD
Judge

AFFIRMED

OPINION

The plaintiff, Frank Watts, has appealed from the judgment of the Trial Judge affirming the action of the Civil Service Board of the city of Columbia in suspending plaintiff from the Columbia Police Department indefinitely.

On April 25, 1977, plaintiff-appellant, Frank Watts, a member of the Columbia Police Department was suspended indefinitely for

> "disobeying a written directive of the Chief of Police and conduct unbecoming an officer, both violations of the Standard Operating Procedure Manual of the Columbia Police Department."

The cause was removed to the Circuit Court by certiorari, where the Trial Judge, sitting without a jury, entered a judgment by which the action of the Civil Service Commission was "sustained". On appeal to this Court plaintiff's brief summarizes the six assignments of error in the following issues:

> "I. Did the action of the policeman in engaging in a heated discussion with the Attorney General amount to conduct unbecoming an officer?
>
> II. May a Chief of Police lawfully order a policeman not to go before a Grand Jury to seek an indictment?
>
> III. Was the action of the majority of the Civil Service Board illegal, arbitrary or capricious or did it exceed its jurisdiction?"

Pertinent material facts are as follows:

On June 4, 1976, as a result of testimony of plaintiff, the Maury County Grand Jury returned an indictment

charging one Ernie Anglin with the offense of concealing stolen property.

When the accused appeared for trial in January, 1977, the prosecuting attorney was of opinion that the indictment was defective, and he was permitted to enter a nolle prosequi with the stated intention of seeking another indictment against the accused.

On February 21, 1977, plaintiff received a letter from the Chief of Police stating:

"Dear Officer Watts:

On February 16, 1977 this office was advised by District Attorney General Bob Gay that you presented a case against a Mr. Ernie Anglin, and it was dismissed in Circuit Court by Judge Sam Lewis on January 17, 1977. General Gay stated that you consulted with him at his Lawrenceburg office on February 10, 1977 at 8:45 a.m. at which time General Gay informed you that this case would not be represented to the Maury County Grand Jury due to an inadequate case.

I was further advised that your attitude in his office on this matter was conduct unbecoming an officer. It was also mentioned that you attempted to pursue this matter as a civilian, which you cannot do, based on the facts you have already testified to information you obtained as a police officer.

You appeared before the Grand Jury and prosecuted this case in January, 1977 representing yourself as a Columbia Police officer. You were not under any direction or supervision to act as a police officer representing the Columbia Police Department in this case. This is to advise you that you shall not proceed with any evidence to the next Grand Jury or any other

court, news media, or any other persons concerning this case unless you have prior clearance from either me or the City Manager. Your conduct representing yourself to the Grand Jury as an authorized representative of the Columbia Police Department is subject to further review.

You have been given previous reprimands regarding policies and procedures of this department without going through the official channels. Your conduct and investigation into this matter without approval of the proper authorities is in defiance of previous reprimands, and you will be notified of the specific disciplinary measures to be taken.

Sincerely yours,

/s/ Edward L. Holton
Edward L. Holton
Chief of Police

ELH:nc

cc: City Manager
Employee's file
Civil Service files

APPROVED: /s/ Barrett H. Jones
Barrett H. Jones, City Manager"

Thereafter, plaintiff showed the letter to two members of the judiciary.

On March 9, 1977, plaintiff addressed the following letter to the City Manager:

"Mr. Jones:

I Frank Watts request permission to go before the Grand Jury that is now in session with the same evidence that I had when I went before them in June of 1976, and got an indictment against Mr. Ernie Anglin.

The case was dismissed by request of the District Attorney General's office, do (sic) to the fact that they made an error in the indictment.

I have no further evidence in this case. I need an answer right away.

Thank you

Officer Frank Watts
Columbia Police Dept."

On March 10, 1977, the Chief of Police wrote plaintiff as follows:

"Dear Officer Watts:

This letter is in answer to your request of March 9, 1977 to appear before the Grand Jury on an Ernie Anglin case. You stated in your request that you had no additional information and only wanted to return to the Grand Jury because the previous trial was dismissed due to an error.

It is the opinion of this office that since no record or case number was ever entered into the files with the Columbia Police Department on this case that your request be denied. If this is to be pursued and you would share your information and evidence with our Detective Division which handles our investigative matters on criminal problems, and if upon their investigation with your aid and evidence found probable cause to prosecute this case, this department would certainly grant you permission to do so.

After conferring with the Attorney General, it was his opinion that there was evidence lacking in this case. It was stated in your previous reprimand that you did not have a case against Mr. Ernie Anglin, and

therefore, your permission to pursue this case is denied. Your letter of reprimand concerning this matter dated February 21, 1977 still stands.

Sincerely,

/s/ Edward L. Holton
Edward L. Holton
Chief of Police

ELH;nc

APPROVED: /s/ Barrett H. Jones
Barrett H. Jones, City Manager

Thereafter, without further consultation with any City or Police official, plaintiff appeared before the Maury County Grand Jury without being subpoenaed and testified in support of the re-indictment of Anglin on the charge of possessing stolen property. At this time he was asked whether he had discussed the case with city detectives, and he answered in the negative.

The Grand Jury did not indict Anglin.

Thereafter, plaintiff had a discussion of the matter with the Attorney General which became "heated" and in which plaintiff said, "No two-bit politician is going to keep me from presenting a case to the grand jury."

At no time did plaintiff report to his superiors that he was investigating the Anglin matter or that he would testify to the Grand Jury on the subject. The Columbia Police Department has no record of plaintiff's activities, findings or actions in regard to Anglin, except as recorded in the previously quoted correspondence.

The Columbia Police Department Manual, a copy of which had been given to plaintiff, includes the following test:

"All lawful orders of superior officers shall be cheerfully, faithfully and promptly obeyed and enforced without question or argument. If any officer does not clearly understand an order, he shall ask for such information as may be necessary for a clear understanding but under no circumstances shall he question the authority of a superior officer or engage in any argument concerning the order given."

. . . .

"Members shall at all times be courteous and civil to the public and to one another. They shall be quiet, orderly, attentatively and respectfully and shall exercise patience and discretion in the performance of their duties. At no time shall they use coarse, profane or insultant (sic) language to any citizen or shall they speak disparingly (sic) of any nationality, race, creed, religion or political belief."

Plaintiff relies upon testimony of the two members of the judiciary who were consulted by him and who testified to their opinion of the right of any individual to appear and testify to a grand jury on any matter. It is exceedingly regrettable that plaintiff saw fit to draw these two excellent judges into this controversy. The testimony elicited from them is not considered material to the issues upon which the appeal will be decided by this Court.

The issues before this Court are:

1. Whether a city police department may properly require its officers to pursue investigations and prosecutions consistent with the prescribed channels, communications and record keeping policies of the department, and

2. Whether the conduct of the plaintiff in disregarding such requirements and/or in his conference with

the Attorney General were such as to justify the action taken by the Commssion.

3. Whether the action of the Civil Service Board was illegal, arbitrary or capricious, or in excess of its jurisdiction.

Issue No. 1, above, does not involve the unlimited right of a citizen to communicate with the Grand Jury. This is so because no issue is made of plaintiff's right to go before the Grand Jury *as an individual.*

The problem arises from the fact that plaintiff was a sworn law enforcement official, a member of a municipally sponsored, supported and controlled police agency. This being true, all of the law enforcement actions of plaintiff were presumptively committed in the course of his employment with the City; and the City sustained an exposure to liability for such actions. Indeed, the City has been sued by Anglin for the actions of plaintiff.

If the City is to be liable for the actions of its employee, then the City is entitled to have such control of the actions of the employee for which it might be liable, the actions which are presumptively or actually committed within the scope of plaintiff's employment.

If plaintiff had seen fit to obey instructions by sharing information with designated police officials and if such officials had deemed plaintiff's information to be insufficient for prosecution, then the proper official of the police department would have had the authority to forbid plaintiff to prosecute *in his capacity as a policeman.* In this event, plaintiff would retain his right *as an individual* to appear before the Grand Jury; and the police department would have a right to disavow any authorization for or connection with the prosecution in order to assure that civil liability for the prosecution rested solely upon plain-

tiff as an individual, and not upon the City for official acts of one of its policemen. Also, the Grand Jury, in its discretion, had the power to weigh the disapproval of police officials against the charges brought by plaintiff as an individual.

Plaintiff's brief concedes that this action is governed by T.C.A. §27-914 which limits the review of municipal civil service actions to common law certiorari.

In such actions the reviewing court is limited to inquiry as to whether the administrative agency acted fraudulently, illegally or arbitrarily. *Hoover Motor Express Company v. Railroad and Public Utilities Commission,* 195 Tenn. 593, 261 S.W.2d 233 (1953).

Under the common law writ of certiorari, questions of law only will be reviewed by the courts. An action of an administrative agency which is not supported by any evidence is arbitrary and void and may be quashed on common law writ of certiorari. Whether or not there is any material evidence to support the action of the agency is a question of law to be decided by the reviewing court upon an examination of the evidence introduced before the agency. Any additional evidence offered to the reviewing court is limited to the question of whether the agency exceeded its jurisdiction or acted fraudulently, illegally or arbitrarily. *Hoover Motor Express Co., Inc. v. Railroad & Public Utilities Commission,* 195 Tenn. 593, 261 S.W.2d 233 (1953). *People's Bank of Van Leer v. Bryan,* 55 Tenn. App. 166, 397 S.W.2d 401, *Bayside Warehouse Co. v. Memphis,* 63 Tenn. App. 268, 470 S.W.2d 275, *Brown v. Tenn. Real Estate Comm.,* Tenn. App. 1972, 494 S.W.2d 506, Cert. den. 414 U.S. 877, 38 L ed 2d 122, 94 Sup. Ct. 54.

In view of the discussion (above) of the rights of a City to control the official acts of its policemen, and the

admitted disregard of the instructions of the Chief of Police, quoted above, this Court concludes that the Commission was acting upon substantial evidence and proper, legal and constitutional grounds in finding plaintiff guilty of misconduct meriting discipline.

In respect to the conversation with the Attorney General, this Court has concluded that there is substantial material evidence to support the finding that plaintiff was guilty of violating the police regulation against "course, profane or insultant (insulting) language." The constitutional right of free speech allows the reasonable expression of opinions, but does not prevent a police department from limiting the manner of expression by its members. The use of such a derogatory remark to and about a high public official charged with a constant working relationship with the police department and in such a loud voice as to be heard by others outside the building can hardly be characterized as a compliance with the quoted regulation.

The foregoing disposes of the first two issues proposed by appellant.

In regard to the third issue, the only argument offered by appellant is as follows:

> "Board member Moore was belligerent throughout the hearing and made *all* the motions to exclude evidence offered by Appellant. He even made the adjournment motion. He told Appellant's counsel that he was trying to confuse the issue and attempted to tell counsel the course he would follow during the hearing. He acted the prosecutor throughout the entire hearing.
>
> Previous to the official Board meeting, the Board met to discuss a date for the setting of the hearing,

at which meeting in public and in front of the news media made the statement, 'I see that our friend Watts and his nutty lawyer are coming up again.'

Board member Moore not only was belligerent and unfair in his actions while sitting as a member of the Board, but did not give a fair and impartial hearing, he having previously made up his mind that Appellant was guilty and had a nutty lawyer. Appellant, therefore, further says, that since the vote was 3 to 2 and since the other two members of the prevailing side invariably voted the same way as did Board member Moore, that he illegally, arbitrarily, and capriciously influenced the other members of the Board and that had he, the Appellant, been given a fair hearing by an impartial Board, the results would have been different. In other words, if Board member Moore had not previously made up his mind the vote could just as easily have been 3 to 2 for retaining Appellant on the Police Department, or 5 to 0."

It will be noted that the argument contains no citations to the record to support any of its factual allegations. Appellant's "Statement of the Case" contains the following factual statement relating to the present issue:

"Mr. Moore, a member of the Board, made the statement, "I see our friend Watts and his nutty lawyer are coming before us again"; Mr. Moore subsequently sat as a member of the Board on the Watts case; Mr. Moore spoke out in a strong voice at all replies he had at the hearing. (B.E. pp. 23-25)"

The only supporting testimony found in the cited portion of the bill of exceptions is as follows:

"A. He said, "I see our friend Watts and his nutty lawyer are coming before us again."

. . . .

A. Well, in a majority of objections or whatever the replies that he had to the offense, there was a strong tone of voice. In other words, he wasn't quiet about his talking. In other words, he was heard throughout the meeting room quite clearly."

Appellant also states in his brief:

"Mr. Moore made the majority of the motions to disallow the evidence and objected to what was to be submitted to the hearing. (B.E. p. 28)"

The testimony cited is as follows:

"Q. Is it your understanding that Mr. Brown was the Chairman?

A. Yes.

Q. Now, who was the one who made the majority of the motions on disallowing our evidence?

A. In other words, who objected to what was to be submitted to the hearing?

Q. Yes.

A. Mr. Moore."

Appellant also stated in his brief:

"Eugene R. Moore, one of the members of the Board, denied he made the statement attributed to him; he said his statement was "here comes our friend Watts and his lawyer again"; he testified that he thought someone else was his attorney; that he did not know "this man" was going to be his attorney. (B.E. p. 36)"

Appellant's admission obviates the recitation of admitted testimony.

Appellant also states in his brief:

"Mr. Watts had been before the Board on another matter, but not to face charges. (B.E. p. 40)

He was angry "at this man (Mr. Fleming) because of the fact that he and this attorney here sometime got together and wanted to do away with the first charge, you see." (B.E. p. 42)"

The cited pages contain the testimony of Mr. Moore as follows:

"Q. Now what do you mean when you say here comes Watts again?

A. Because, you see, here a year or two ago he also came against the Civil Service Board for the procedure that the Board and the City had taken in regard to the appointment of the Assistant Police Chief. You see, we were up here before you see and that's why I made the statement.

. . . .

Q. Now, one of the very first objections that was made, and I believe that you brought this up, or you can correct me if I'm wrong on that, had to do with certain things that I wanted to ask certain people about and you accused me of trying to confuse the issues and successfully for a good while stopped me from going into certain things, do you recall that?

A. Yes, I do.

Q. And you were later overruled by Mr. Fleming I believe, were you not? Mr. Fleming suggested—

MR. FLEMING: Your Honor—

THE WITNESS: No, I wasn't. I'll tell you why, he didn't have nothing to do with it. In fact, I was mad at him after this thing was over.

. . . .

(By Mr. Fleming)

Q. Mr. Moore, I believe you did state something there might be of interest to the Court. Would you repeat your feelings toward me after the hearing?

A. Yes. I was angry at this man because the fact that he and this attorney here sometime got together and wanted to do away with the first charge, you see. Now if there was some reason that that first charge wasn't proper, then this should have been determined long before the charge was ever made and that has to do with whether an individual can take it to the Grand Jury without permission from an employer. If that's the way the Court will rule, you see, these things should have been known and this man should never have been charged with that.

. . . .

(By the Court)

Q. Mr. Moore, on what grounds did you find Mr. Watts should be suspended?

A. Well the fact that, the fact that he had been given the notice to bring his evidence to the City Police which he hadn't done before, to the detectives and let them determine from their investigation whether this case should be brought to the Grand Jury again, but he did not do that. He disobeyed his superiors. I've been an employer in some way ever since 1947 and especially with the City, you've got to

have a certain amount of discipline within an organization, otherwise you don't have anything you see. You have havoc and you can not have a—.

Q. In other words, you actually found him guilty of not obeying a superior officer then maybe?

A. Right.

Q. Or not cooperating with a superior officer?

A. Right.

Q. Is that the only charge you found him guilty of?

A. Well then of course the testimony on the second charge from Mr. Gay of course was quite evident that he was also guilty of the conduct unbecoming an officer because of his conduct down at Mr. Gay's office."

The foregoing are all of the material allegations of appellant's brief and all of the support therefor in the bill of exceptions.

The Trial Judge, sitting without a jury, found adversely to appellant as to these allegations. In part, the finding was based upon judgment as to credibility of witnesses and otherwise upon the preponderance of the evidence. The finding of a trial judge on an issue which hinges on the credibility of a witness will not be reversed on appeal unless, other than oral testimony of witnesses, there is found clear, concrete and convincing evidence to the contrary. *Tenn. Valley Kaolin Corp. v. Perry,* Tenn. App. 1975, 526 S.W.2d 488. No such grounds for reversal are found in this record.

Non-jury judgments are presumed correct unless the evidence preponderates otherwise. T.C.A. §27-303. The evidence does not preponderate otherwise.

Accordingly, the finding of the Trial Judge as to the third issue, above, will not be disturbed.

All of the complaints of the appellant have been examined and have been found insufficient to require reversal.

The judgment of the Trial Judge is affirmed, that is: the action of the Civil Service Board is affirmed; the petition of plaintiff for certiorari is dismissed; and all costs, including costs of this appeal, are taxed against appellant and his surety.

Affirmed.

/s/ Henry F. Todd
Henry F. Todd, Judge

Shriver, P.J., Concurs
Drowota, J., Concurs